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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 746

THE PENNSYLVANIA RAILROAD COMPANY; ERIE RAILROAD COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY AND THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, ATTORNEY GENERAL OF THE STATE OF OHIO, AND PITTSBURGH COAL COMPANY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANTS.

The case is before this Court on direct appeal (Title 28 U. S. Code, Sec. 380) to review a judgment of the District Court of the United States for the Southern District of Ohio, specially constituted and consisting of the honorable Florence E. Allen, Circuit Judge; Robert R. Nevin, District Judge; and Benson W. Hough, District Judge. As appears

from a note at foot of the decree, District Judge Hough, who sat on the hearing of the cause and participated in the conference at which the case was decided, had died November the 19th, 1935, before said decree was signed on December 11, 1936, (R. 69, 70).

No objection or question as to the validity or propriety of the entry of the decree appealed from is made or raised on score of Judge Hough's inability to participate in the formalities usually attending the entry of a three-judge court decree.

OPINIONS.

The opinion which also constitutes the decree of the District Court has not been officially printed, but may be found in the printed transcript of the record at pages 69 and 70. It is not accompanied by any findings of facts, special or otherwise, nor by separately stated conclusions of law thereon as required by Amended Equity Rule 70½:

See:

Southwestern Bell Tel. Co. v. *City of San Antonio*, 75 F. (2d) 880, 881; certiorari denied, *San Antonio* v. *Southwestern Bell Tel. Co.*, 295 U. S. 754;

Edwards v. *Holland Banking Co.*, 75 F. (2d) 713, 715;

Louisville & Nashville R. Co. v. *United States*, 10 Fed. Supp. 185, 189, wherein as indicative of the scope and application of Equity Rule 70½, it is said:

> "There is little need for findings of fact in this suit for there was no evidence offered by either side. The pleadings, together with an affidavit by defendant and certain exhibits attached to the complaint, constitute the sole basis of our findings. We view Supreme Court Equity Rule 70½ (28 U. S. C. A. Sec. 723), however, as imperative, and we accompany this memorandum with findings of fact and conclusions of

law in the hope that they will clarify and shorten the statement of issues in case of an appeal."

Compare also:

Sparks, U. S. Attorney, v. *Mellwood,* 74 F. (2d) 695.

The combined opinion and decree of the District Court below is short and in its entirety reads, (R. 69-70) as follows:

"Decree—Filed Dec. 11, 1935

"This cause came on to be heard on the pleadings, the record and the argument of counsel. The court, upon consideration thereof, is of the opinion that there is substantial evidence supporting the finding of the Public Utilities Commission of Ohio that there was no dealing in, or with respect to, this coal in the course of its transportation from the mine in Pennsylvania, from Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio; that the coal throughout the movement from the mines, from Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio, remained in the ownership, possession and control of the Pittsburgh Coal Company which was also the owner of all the facilities employed in that movement; that there was no transportation of the coal in any original package to Negley, that there was no through and continuous transportation from the mine to Negley, and that there was no commerce in the coal in the course of its transportation from the mine to Negley.

"The order complained of in the bill, since the interstate transportation covered by the record was carried on wholly by private carrier, and since the transportation by common carrier was wholly within the State of Ohio, is lawful and proper (Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177; The Pipe Line Cases, 234 U. S. 548, 562; Atlantic Coast Line Ry. Co. v. Standard Oil Co. of Kentucky, 275 U. S. 257), and the prayer of complainants' bill should be denied.

"It is therefore, by the court ordered, adjudged and decreed that the prayer of complainants in their bill contained be and it is hereby denied and complainants' bill is hereby dismissed at complainants' costs. Exceptions to the ruling and order of the court are allowed to complainants and intervenors."

The Report and Order of the Public Utilities Commission of Ohio are set forth in entirety at pages 8 to 42, both included of the transcript of the record, being marked "Appendix A to Petition" (See R. 8, *et seq*).

JURISDICTION.

Paragraph 1 of Rule 12 has been complied with and "Probable jurisdiction has been found" by the Court—see Journal entry of March 2, 1936.

POINTS RELIED UPON IN SUPPORT OF APPEAL AND FOR REVERSAL.

1.

The transportation of the commodity, to-wit, bituminous coals, from mines of origin in Pennsylvania to market or consumer destinations in Ohio constituted both transportation and commerce in interstate as opposed to intrastate commerce, and rates and charges for road hauls and services, terminal or otherwise, provided by common carriers participating therein were controlled by applicable interstate tariffs on file with the Interstate Commerce Commission. In such circumstances The Public Utilities Commission of Ohio was without jurisdiction and its order of March 26th, 1935, since upheld by the order of the United States District Court for the Southern District of Ohio, Eastern Division, under review, was a nullity and void;

2.

There was no evidence of substantial import introduced before The Public Utilities Commission of Ohio to sustain its finding to effect that there were no dealings in or with respect to said bituminous coals in course of its transportation from the mine in Pennsylvania, or Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio; and that said coals throughout their movement from Smith's Ferry, Pennsylvania, to Youngstown, in Ohio, were not in through and continuous transportation in commerce;

3.

The admitted purpose and continuing intent on the part of the shipper to market in Ohio coals mined in and transported from points of origin in Pennsylvania constituted said coals while in course of such transportation and pending delivery at ultimate destinations, objects of interstate as opposed to intrastate commerce, the movement from Pennsylvania mines having been undertaken and carried on for purposes of sale or other commercial disposition to consumers or consignees at Ohio destinations.

4.

The continuing purpose and intent on part of the shipper and owner to sell or otherwise commercially dispose of coals shipped from one State to destination points in another State constitute such coals articles of interstate commerce, irrespective of whether the vessels or vehicles in which such transportation wholly or in part is effected are common carrier or privately owned.

5.

The shipments here in question were actually treated by carriers controlled by the shipper as in interstate commerce.

THE STATUTE.

Section 1 of the Interstate Commerce Act provides:

"(1) That the provisions of this part shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

"• • • • • • — from one State or Territory of the United States, • • • to any other State or Territory of the United States, • • •."

"(2) The provisions of this Act • • • shall not apply—

"(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; • • •."

"(3) • • • The term 'railroad' as used in this Act shall include all • • • lighters • • • used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad • • • under a • • • agreement or lease and also all • • • spurs, tracks • • • of every kind used or necessary in the transportation of the • • • property designated herein • • • The term 'transportation' • • • shall include • • • cars, and other vehicles; vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied for the use thereof and all services in connection with the receipt delivery • • • and handling of the property transported."

Section 6:

"(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * *."

"(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *."

THE CARRIERS CONCERNED.

The Pennsylvania Railroad Company, the Erie Railroad Company, The Baltimore and Ohio Railroad Company, and The Pittsburgh & Lake Erie Railroad Company, appellants here, are each and all common carriers by steam railroad, subject to provisions and requirements of the Act to Regulate Commerce as amended, owning and operating lines of of railroad engaged in the carrying of passengers and freight within and to and from the several States of Ohio and Pennsylvania. Each of said railroad companies is engaged in the transportation of coals in both interstate and intrastate commerce within said State of Ohio, particularly for consumption and use in and about the city of Youngstown, in said State.

The Pittsburgh, Lisbon & Western Railroad Company, spoken of as the "Lisbon", is a common carrier by steam railroad subject to the Act to Regulate Commerce as amended, owning and operating in both interstate and intrastate commerce a line of railroad from New Galilee, in said State of Pennsylvania, through Negley, Mill Rock and Signal, to Lisbon, all in the State of Ohio, a total distance of approximately 23.3 miles. It has interchange facilities and track connection with The Pennsylvania Railroad Company at New Galilee, with the Youngstown and Suburban Railway Company (hereinafter described) at Signal, and with the Erie at Lisbon.

The Youngstown and Suburban Railroad Company, hereafter spoken of as the "Suburban" or the "Y. & S.", is a railroad engaged in the transportation of bituminous coal and other commodities in both interstate and intrastate commerce by a line of railroad extending from Signal to Youngstown, both in Ohio, a distance of 22.2 miles. It is generally operated by electric power but has authority to use steam power if and when preferred.

It has interchange facilities and track connection with the Lisbon at Signal and with The Pennsylvania at and in Youngstown, Ohio.

PITTSBURGH COAL COMPANY.

The Pittsburgh Coal Company is a corporation under the laws of the State of Pennsylvania, with charter power, *inter alia,* to engage in the mining, production and sale of coal *and the transportation thereof to market;* its principal office and place of business are in the city of Pittsburgh, Pennsylvania, and it is lawfully registered to do business in the State of Ohio (R. 56).

It is the owner of a number of coal mines located upon and accessible to the Monongahela River in the State of

Pennsylvania, said mines being called "river mines" because of their location and "because their output is largely transported by barges over the river highways in any movement to market. These mines open into many thousands of acres of coal land owned by" said Coal Company (R. 58).

The Pittsburgh Coal Company was the shipper and claims to be the owner of the four car-loads of bituminous coal which were both the cause of and the occasion for the instant proceedings. The loaded coals were mined by the Pittsburgh Coal Company from its "river mines located on the Monongahela River, in the State of Pennsylvania", and moved by water in the Coal Company's barges from mines to a point at or near Smith's Ferry, Pennsylvania, where it was transferred from said barges into Coal Company's cars and thence moved over rails laid down by the Coal Company on lands which it owned, to Brush Run, Ohio, where, without pause or stoppage, it was put through a so-called preparation plant and dropped into waiting cars suitably placed by the Lisbon. From said Brush Run the Lisbon's cars so loaded were moved under Lisbon's power, via Negley, to Signal, a point on the main line of the Lisbon at its connection with the Y. & S., whence it was moved over the tracks of the latter to a point of connection with The Pennsylvania for interchange to the Erie and ultimate delivery by the Erie to consignees in Youngstown.

INTERCORPORATE RELATIONS OF—PITTSBURGH COAL COMPANY, PITTSBURGH, LISBON & WESTERN R. R. CO., and YOUNGSTOWN & SUBURBAN RY. COMPANY, AND THE BEARINGS THEREOF IN THE INSTANT PROCEEDINGS.

In 1927 the Pittsburgh Coal Company purchased the entire capital stock of the "Lisbon" and installed a new

board of directors made up of officers and agents of the Coal Company and other subsidiaries (R. 213).

In January, 1929, the "Lisbon" purchased approximately ninety-nine per cent of the capital stock of the Youngstown and Suburban Railway Company, and the then existing officers and directors of the latter were replaced "by the same officers and agents of the Coal Company who then formed the Board of the Lisbon."

June 7, 1929, the charter of the Youngstown and Suburban was amended to authorize it to construct a branch line from a point on its main line in the town of Columbiana, to a terminus in or near East Liverpool, both within the State of Ohio.

September 26, 1929, the Lisbon sold its holding of Y. & S. capital stock to Pittsburgh Coal Company for the price at which it had purchased such stock, and thereafter during the years 1929 and 1930 the Y. & S. built the branch line from Columbiana, Ohio, to a physical connection with the main line of the Lisbon at Signal, Ohio, using for such purpose "funds advanced by the (Pittsburgh) Coal Company, the Lisbon and certain affiliated companies" (R. 214).

The (Pittsburgh) Coal Company has dominated the affairs of the Lisbon and the Youngstown and Suburban since it became interested in them; it purchased them pursuant to a plan to secure cheaper transportation to the Ohio coal markets, and it has used and improved them as instruments in the furtherance of such a plan. A majority of the directors and of the officers of the Lisbon and the Youngstown and Suburban are officers or directors of the (Pittsburgh) Coal Company also; the officers of the railroad companies generally receive only one salary instead of separate salaries from each company; the same or adjoining offices are used by the three companies (the Lisbon and Youngstown & Suburban paying no rent), the Lisbon and Youngstown &

Suburban have common offices in Youngstown, several of the officers perform their duties for all the companies from the same desk, some being located in space generally devoted to the Coal Company and some in space generally devoted to its affiliated railroad companies; all three companies file a joint income tax return; and improvements of the Youngstown & Suburban have been financed by loans from the Pittsburgh Coal Company (R. 215-216).

Shortly after installation of the new Board of Directors of the Lisbon, consisting, as stated, of officers and directors of its new owner, the Pittsburgh Coal Company, the Lisbon applied to the Interstate Commerce Commission for authority (certificate of convenience and necessity) to build an extension from Mill Rock to Youngstown, Ohio, a distance of 24.4 miles, and a second extension from Negley, Ohio, to Smith's Ferry, Pennsylvania, a distance of 13.3 miles (R. 213 *et seq.*).

Pittsburgh Coal Company intervened on said application before the Interstate Commerce Commission "as an additional applicant," and The Pennsylvania and The Pittsburgh and Lake Erie, two of the appellants here, opposed said application (R. 213).

"The (Pittsburgh) Coal Company's purpose in purchasing the Lisbon and attempting to extend it was (as it declared before the Commission) to secure transportation of its coal to northeastern Ohio at a cost lower than the rates charged by the trunk lines for similar transportation" (R. 213. Findings, etc., West J., U. S. D. C. Nor. Dist. Ohio.)

In disposing of Lisbon's said application for certificate of convenience and necessity, the Interstate Commerce Commission observed that—

> "The principal objection to the proposed construction is that the bulk of the expected new traffic would

be diverted from the rail lines now handling it. * * * (150 I. C. C. Rep. 43, at p. 51. Cited R. 214.)

"It is not shown, however, that the rates proposed to be charged for the rail haul will be lower than the rates for similar service on existing lines. So far as the expected traffic of the principal shippers of coal is concerned, the proposal, in effect, is that the shippers by the use of their own conveyances and at their own expense will transport their coal to Smith's Ferry and there offer it to the rail carrier for shipment to the Youngstown industries. The movement from either Smith's Ferry or Beaver to Youngstown would be interstate and therefore directly within our jurisdiction. The important question for consideration is whether or not the public convenience and necessity require the construction of an additional rail line for the transportation between the river and the Youngstown district. * * * (150 I. C. C. 52.)

"It is also clear of record that the construction of the proposed new line would result in unnecessary duplication of facilities, if it is possible to make advantageous use of the existing lines of The Pennsylvania and the Pittsburgh & Lake Erie. The use of these lines between the Ohio River and the Youngstown district at reasonable rates would reduce the losses which the intervenors apprehend through the diversion of their traffic to the rail-and-water route proposed by the applicants.

"Authority to construct the proposed new line will not be granted until we are fully satisfied that a use of the existing rail routes between the Ohio River and the Youngstown district which will produce substantially the results proposed by the applicants is impracticable. * * * The record will therefore be held open and the proceedings assigned for further hearing in order that that phase of the evidence may be amply developed. The Pittsburgh & Lake Erie and The Pennsylvania will be expected to make their positions in regard to the proposed use of their lines entirely clear in order that we may be fully advised in the matter.

"The present applications contemplate the practical control and operation of a common carrier by its principal shipper, a condition to be avoided. Not only is it proposed that the railroad shall be thus controlled, but it is also proposed that the transfer facilities at the Ohio River shall be under control either of the applicants or of the Youngstown Sheet & Tube Company. Should it be found necessary, therefore, as a result of our further investigations, to grant a certificate for the construction of a new railroad line between Smith's Ferry and the Youngstown district, consideration will be given to the imposition of a condition that the Lisbon shall not be under the control, direct or indirect, of the Pittsburgh Coal Company or any other industry or industries, and the further condition that terminal facilities shall be provided on the Ohio River which shall not be under such control and shall be open to the free use of all shippers." (Ibid. 55).

Such were the conclusions and requirements of the Interstate Commerce Commission, arrived at December 8, 1928, (150 I. C. C. Rep. 43). They were promulgated December 16, 1928, and it is interesting to note that within one month thereafter, that is, in January, 1929, the Lisbon purchased upwards of ninety-nine (99) per cent. of the capital stock of the Y. & S., which at that time owned and operated an interurban electric line from Youngstown to Columbiana and Leetonia, Ohio, (R. 214).

Under date of March 16, 1929, the Interstate Commerce Commission, (150 I. C. C. Rep. 619)—further hearing having been held "for the development of additional evidence" and "to enable The Pennsylvania and the Pittsburgh & Lake Erie to make clear their positions in regard to the use of their lines," found that (150 I. C. C. 619):

"At the further hearing, the Pennsylvania announced that it would be prepared to provide facilities for the transfer of coal from barges to railroad cars, and fin-

ished steel products from cars to barges, at a point known as Conway, Pa., which is near Beaver and is 43.8 miles from Youngstown, and would furnish adequate transportation for these commodities on its existing tracks between Conway and Youngstown. The Pittsburgh & Lake Erie stated its willingness to provide similar transfer facilities at a point known as Colona, Pa., about 41 miles from Youngstown, and would likewise be prepared to transport like traffic on its existing tracks between Colona and Youngstown. * * * The Pennsylvania would also cooperate with the Pittsburgh & Lake Erie and the Baltimore & Ohio by offering those carriers trackage rights over its line between Conway and points of interchange with their lines, provided ample facilities should exist or could be provided at such points for handling the traffic. The Pittsburgh & Lake Erie also proposed to grant trackage rights to the Pennsylvania and the Baltimore & Ohio to enable them to reach the transfer at Colona, or to cooperate with the Pennsylvania, if found advantageous, in providing joint transfer arrangements at Conway or at Colona to be used in connection with trackage rights, thus avoiding construction of duplicate transfer facilities; * * *

"The facilities proposed to be installed by the Pennsylvania on its own line at Conway would include units for the handling of coal and of steel, together with connecting tracks, the whole estimated to cost $707,000. The coal-handling unit would cost $377,000 and would have a capacity of 1,000,000 tons per annum. Additional units could be provided at the same cost per unit.

* * * * * * *

"The Pittsburgh & Lake Erie at the time of the further hearing had secured an option on 77 acres of land on the river bank at Colona. In its brief, filed since the hearing, the carrier states that the option has been exercised. The cost of the land thus secured is $462,000. An unloading unit for handling coal, with

a capacity of 1,000,000 tons per annum, could be constructed there at an estimated cost of (ibid. p. 620) $250,000.

* * * * * * *

"the Pennsylvania tentatively proposed a rate of $1.02 per ton on coal from Conway to Youngstown, rates to other points involving the same haul, in whole or in part, to be established in relation to the rate named. * * * (ibid p. 621.)

* * * * * * *

"Whatever rates may be determined to be reasonable for the rail hauls, it is necessary to conclude that the service can be performed at less capital and operating costs by either the Pennsylvania or the Pittsburgh & Lake Erie than by the applicant ('Lisbon' and the Pittsburgh Coal Company) by way of Smith's Ferry and the proposed new line. It is also probable that the service by way of Conway or Colona and the trunk lines could be more expeditious than by way of Smith's Ferry. Location of the transfer facilities at Conway or Colona would reduce the river distance by more than 15 miles and would avoid the passage of several dams and locks * * * (ibid p. 623).

* * * * * * *

"We must assume, however, that the trunk lines will provide adequate service and reasonable rates in connection with river transportation. Counsel for both the Pennsylvania and the Pittsburgh & Lake Erie proposed that those carriers file line-haul rates on coal immediately, in order that investigation of their propriety may proceed while the needed facilities are under construction. The pending application for authority to construct the line from Smith's Ferry will be denied with the understanding that rates will be filed by the trunk-line interveners as proposed" (ibid p. 624; R. 213-214).

and a formal order was entered March 16th, 1929, by the Interstate Commerce Commission denying said application of the Lisbon to construct the proposed branch lines of road (ibid p. 624).

Within one month after the Interstate Commerce Commission had indicated intention (December 16, 1928) to deny the Lisbon's application "for authority to build an extension from Mill Rock to Youngstown, Ohio (28.4 miles) and a second extension from Negley, Ohio, to Smith's Ferry, Pennsylvania (13.3 miles) in event that the trunk lines, viz., The Pennsylvania, the Pittsburgh & Lake Erie and The Baltimore and Ohio, would "construct and furnish river-rail terminals, that is, facilities for removing coal from barges on the Ohio River and placing it in railroad cars, for transportation from such terminals to Youngstown and points in Northwestern Ohio," and before Lisbon's said application had been "unconditionally refused," as it was on March 16, 1929 (R. 213-214, citing 150 I. C. C. Rep. 49, 619), the Lisbon, owned as above stated one-hundred (100) per cent., or in entirety, by the Pittsburgh Coal Company, purchased (in January 1929) approximately 99 per cent. of the capital stock of * * * Youngstown & Suburban Railway Company above referred to then operating as a common carrier between Youngstown and Columbiana, both in Ohio.

First having replaced Y. & S. directors "by the same officers and agents of the Coal Company who then formed the Board of the Lisbon," the charter of the Y. & S. was amended on June 7, 1929, to authorize it (Y. & S.) to construct a branch line from a point on its main line in the town of Columbiana, to a terminus in or near East Liverpool, Ohio" and thereafter, on September 26, 1929, the Lisbon sold its entire holding of Y. & S. stock to Pittsburgh Coal Company, and

"During the years 1929 and 1930, the Youngstown & Suburban built a branch line from Columbiana to a physical connection with the main line of the Lisbon at Signal, Ohio, using funds advanced by the Coal Company, the Lisbon and certain affiliated companies. On May 26, 1931, the Youngstown & Suburban charter was again amended to authorize it to use steam motive power" (R. 214).

Again, after the Interstate Commerce Commission had refused (March 16, 1929) Lisbon's said application for authority to make extensions—

"the Lisbon constructed a branch or spur track from its main line at Negley down the valley of Little Beaver Creek for a distance of about one-half mile (towards Brush Run, Ohio). In 1931 and 1932 said (Pittsburgh) Coal Company purchased a strip of land between the south end of the Lisbon's said half mile spur and Smith's Ferry, Pa. * * * A small portion of this land was procured from the Lisbon.

"Upon said strip of land which is owned in fee simple and has been paid for by said (Pittsburgh) Coal Company, it has constructed at its own sole cost a standard gauge railroad track with one or more tunnels, bridges, etc., of a character similar to main line trackage, and designed to carry a large amount of heavy traffic in standard railroad coal equipment. Said track extends from the Coal Company's dock and river-rail terminal under construction at Smith's Ferry, Pa., northwardly to and connects with the south end of said Lisbon switch near Negley, a distance of some thirteen miles. The cost thereof was approximately $1,400,000. This creates a rail connection which in its physical aspects is substantially similar to the extension desired by the Lisbon when it made its application for extension" (R. 214-215).

"At Brush Run, some two miles south of Negley and a short distance from the track between Negley and Smith's Ferry (Penna.) and connected therewith by

switch tracks, said (Pittsburgh) Coal Company has erected a coal washing plant, for cleaning, sizing and preparing its coal for market. • • •

"The (Pittsburgh) Coal Company intends to employ on all said trackage between Smith's Ferry (Penna.) and the Lisbon connection only its own locomotives and cars handled by its own employees.

• • • • • • • •

"The (Pittsburgh) Coal Company has dominated the affairs of the Lisbon and the Youngstown and Suburban since it became interested in them; it purchased them pursuant to a plan to secure cheaper transportation to the Ohio coal markets, and it has used and improved them as instrumentalities in the furtherance of such a plan. A majority of the directors and of the officers of the Lisbon and the Youngstown and Suburban are officers or directors of the (Pittsburgh) Coal Company; &c., &c. (R. 215-216).

Appurtenant to its said coal preparation plant at Brush Run, Ohio, the Pittsburgh Coal Company owns and operates at Smith's Ferry, Pennsylvania, on the Little Beaver River, near its confluence with the Ohio, track facilities and an unloading dock which has connection with the preparation plant and facilities at Brush Run and with the rails of the Lisbon at Negley, all by means of the "standard gauge railroad track with one or more tunnels, bridges, etc., of a character similar to main line trackage", above referred to (R. 214). It "also owns and operates its own river fleets and barges on the Ohio and Monongahela Rivers" for the transportation of its coal (R. 56, 58, 59).

Referring to the railway track extension from Pittsburgh Coal Company's dock and river-rail terminal at Smith's Ferry, Pennsylvania, northwardly to and connected with the south end of the Lisbon's switch near Negley, it may be

said in passing and by way of information as to matters relating to but probably not immediately in issue in the instant case, that the Pennsylvania and the Pittsburgh & Lake Erie have and do now contend that said line was improperly and unlawfully constructed; that it is in truth but an extension of the Lisbon; a camouflaged production of one of the extensions desired by the Lisbon which the Interstate Commerce Commission, as above, had declined to permit it to make; that even if it should serve but a single carrier, it none the less violates paragraph 22, section 1, of the Interstate Commerce Act because it crosses a State line; that the intent of the Coal Company was and is to evade this law; that with such intent its act as the sole stockholder of the Lisbon which had been denied the right to build, should be regarded as the act of the Lisbon; that the separate corporate entities should be disregarded and that authority to build same was essential under paragraphs 18 to 22, inclusive, of section 1 of the Interstate Commerce Act.

A suit under paragraph 21, section 1, of the Interstate Commerce Act, to enjoin construction and operation of this track extension was instituted by appellants here in the United States District Court for the Northern District of Ohio, Eastern Division, in 1934; the bill of complaint has been dismissed and the cause is now pending on appeal before the Circuit Court of Appeals for the Sixth Circuit, where it has been argued and submitted.

THE RATES.

The published rates applicable on interstate traffic from the Suburban (Y. & S.)-Pennsylvania interchange to Youngstown destinations on the Erie are higher than the rates established by the Ohio Public Utilities Commission applicable on intrastate traffic from same interchange to same destinations.

Prior to the tender for switching of the four carloads of coal The Pennsylvania, to aid it in the performance of its duty to make appropriate applications of its duly published rates, had issued and delivered to the Y. & S. a notice in writing which reads as follows:

"The Pennsylvania Railroad Company

Notice of Prepayment

September 18, 1934.

"Effective at once this Company will not accept shipments of bituminous coal, carloads, from the Youngstown and Suburban Railway at its interchange in Youngstown, Ohio, for delivery to individuals or industries on its own or connecting lines within the switching limits of Youngstown which do not originate at mines within the State of Ohio, until all charges from its connection with the Youngstown and Suburban Railway to point of ultimate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission.

J. B. McCorkle, General Coal Freight Agent" (R. 77).

The shipment and routing of each of said four cars was covered by standard form shipping orders delivered by the Coal Company to the Lisbon at Negley, and for each car so loaded the Lisbon issued its uniform bill of lading receipt; the transportation movement of the loaded cars from Negley via Signal to Youngstown and delivery points (consignees) was wholly within Ohio. The Lisbon received and billed the loaded cars "as Ohio intrastate commerce" and accepted prepayment of freight charges to destinations "at the Ohio intrastate rates." (R. 9).

WHEN TENDERED BY THE Y. & S. TO THE PENNSYLVANIA FOR INTERCHANGE TO THE ERIE THE PENNSYLVANIA REFUSED TO ACCEPT SAID SHIPMENTS UNLESS PREPAID AT PROPERLY APPLICABLE INTERSTATE TARIFF RATES.

When the four loaded cars were tendered by the Y. & S. by placement in the usual manner "on the Y. & S.-P. R. R. interchange track at Youngstown accompanied by the usual advice to switch to the Erie for delivery to the named consignees", the Pennsylvania (the Erie concurring) "refused to accept the said shipments until charges, in accordance with their tariffs applicable on interstate commerce and lawfully on file with the Interstate Commerce Commission, were paid" (R. 5, 9).

Such legal charges have never been tendered either by the Y. & S. or by the Pittsburgh Coal Company, or any other party interested, and the cars with their loads presumably at least, rest at said interchange.

PROCEEDINGS BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO.

With commendable promptness the Y. & S. petitioned The Public Utilities Commission of Ohio for an order which would require The Pennsylvania, an intermediate carrier, and the Erie, as the delivering carrier, "to switch and deliver to consignees in Youngstown, Ohio, at rates and charges applicable on Ohio intrastate coal traffic, (said) four carloads of bituminous coal brought into Youngstown by the Y. & S. as a road-haul carrier" (R. 8).

The Report of the Public Utilities Commission of Ohio appears at pages 8 to 41, both included of the Transcript of the Record and the Commission's Order which notified and required both The Pennsylvania and the Erie "to cease and

desist on or before April 10, 1935, from * * * refusing * * * to transfer, switch and deliver to the named consignees thereof in Youngstown, Ohio, the four carloads of bituminous coal, * * * at the Ohio intrastate rates or charges applicable for such switching service and in effect at the time said shipments were offered to the defendants (Pennsylvania and Erie) in Youngstown by the Youngstown and Suburban Railway Company, &c., appears at R. 41-42.

Said order is dated March 26, 1935 (R. 41).

PROCEEDINGS BEFORE THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

April 15, 1935, complainants The Pennsylvania and the Erie, filed their bill of complaint in the District Court of the United States for the Southern District of Ohio, Eastern Division, against The Public Utilities Commission of Ohio and John W. Bricker, Attorney General of the State of Ohio, to enjoin, set aside and annul said order of said Commission.

Complainants prayed for the convocation of a statutory three-judge court and for an interlocutory as well as permanent injunction (R. 7, 51).

Petition of Pittsburgh Coal Company for leave "to intervene as party defendant" in the District Court, and order granting such leave may be found at pages 56 and 61 of the Record.

The sworn answer of the Pittsburgh Coal Company, "Intervening Defendant" appears at pages 61-66, both included, of the Record.

The fifth paragraph of said answer which appears at page 65 of the Record is both apposite and interesting.

As originally convoked the statutory court was composed of Hicks, Circuit Judge and Hough and Nevin, District Judges (R. 49).

Complainants' motion for interlocutory injunction was duly assigned for hearing at Columbus, Ohio, before the court so composed on May 11, 1935, (R. 52) but was not then heard because of an accident which prevented the court from convening.

It came on for hearing on September 23, 1935, before the court then composed of Florence E. Allen, Circuit Judge, with Hough and Nevin, District Judges, and was submitted as on hearing for final decree, the Public Utilities Commission of Ohio, at suggestion of the court by appropriate order, having first extended the effective date of its order complained of to January 2, 1936 (R. 220).

Pending decision, on November 19, 1935, District Judge Hough died, and final decree was entered December 11, 1935 (R. 69, 70).

Appeal to this Court and motion for Maintenance of *Status Quo* was filed January 3, 1936, and formally allowed the same date (R. 218, 223).

IMMEDIATELY PERTINENT FACTS STATED IN GREATER DETAIL.

The application of the Lisbon joined in by the Pittsburgh Coal Company as intervening "additional applicant," to construct two branch lines from Lisbon's main line, the one northward from Mill Rock to Youngstown, all in Ohio, a distance of 28.4 miles, and the other southward from Negley, in Ohio, to Smith's Ferry in Pennsylvania, a distance of 13.3 miles, having been definitely refused by the Interstate Commerce Commission on March 16, 1929, the disappointed applicants, united in ownership as also in de-

sire and hope, counseled inwardly as to how their object, viz., the movement of coals from mines in Pennsylvania for sale at market destinations in Ohio at rates for the transportation materially less than those prescribed by published tariffs on file with the Interstate Commerce Commission, might otherwise by indirection and as some may think illegally, though practically, be accomplished.

The *locus* and the physical relationship of the several carriers to each other and the named points such as Smith's Ferry, Little Beaver Creek, Brush Run, Negley, Signal and Columbiana, necessarily touched in the transportation course of coal in movement from Pittsburgh Coal Company's mines in Pennsylvania to Youngstown destinations in Ohio, and the relation of the whole to the interstate boundary between said states quite plainly appears on the sketch map appended at the end of this brief.

In January, 1929, that is, between the dates of the first or tentative announcement (December 16, 1928) of the Interstate Commerce Commission and of its final denial on March 16, 1929, the Lisbon had purchased the Youngstown and Suburban and replaced its board of directors with officials from the roster of the Lisbon and the Coal Company; had amended on June 7, 1929, as permitted by the law of Ohio, the charter of the Y. & S. so as to authorize construction of a north-south branch line from Columbiana to form a connection with the Lisbon at Signal, and very shortly thereafter had transferred its entire holding of capital stock of the Y. & S. to the Pittsburgh Coal Company.

In 1931 and 1932, the Pittsburgh Coal Company purchased a strip of land between the south end of the half-mile spur of the Lisbon and Smith's Ferry, Pennsylvania (R. 214) and constructed thereon a standard gauge railroad track between those points designed to carry a large amount of

heavy traffic in standard railroad coal equipment. This construction was at the sole cost of the Pittsburgh Coal Company. A rail-river terminal previously constructed at Smith's Ferry, Pennsylvania, in the mouth of Little Beaver Creek, approximately at its juncture with the Ohio River was likewise wholly owned by the Coal Company, and its rived-rail terminal was provided, with rail facilities extending northwardly to and connecting with the south end of the Lisbon switch near Brush Run and Negley, both in Ohio.

In the pleadings and at various other places in the record and in this brief the trackage from Smith's Ferry, Pa., to Brush Run, Ohio, and connection with the Lisbon spur south of Negley, Ohio, is referred to as the privately owned track or facility of the Pittsburgh Coal Company but appellants have not at any time admitted that such trackage was or could have been lawfully constructed in absence of a certificate of convenience and necessity first duly granted by the Interstate Commerce Commission.

That question is now pending before the United States District Court, Northern District of Ohio, Eastern Division.

The Lisbon connects with the Suburban at Signal, Ohio, and the Suburban in turn runs north to Youngstown, all as quite plainly on said sketch map appears. The Pittsburgh Coal Company, temporarily at least, seems thus to have accomplished for itself indirectly, improperly and probably illegally what the Interstate Commerce Commission had refused to permit it to accomplish directly (150 I. C. C. 619).

On August 2, 1934, certain coal mined in Pennsylvania by the Pittsburgh Coal Company was loaded in its own barge and by it moved down the Monongahela River to Risher, Pennsylvania, where it was held in a harbor maintained by the Coal Company. Twenty-three days later, on to-wit, August 25, 1934, the movement of the coal into Ohio

commenced. It moved by barge again down the Monongahela and Ohio Rivers to Smith's Ferry at the mouth of the Little Beaver River. It was then in the condition in which it is sold to consumers along the Ohio River. Any and all coal unloaded from barges at Smith's Ferry in Pennsylvania and loaded upon railroad cars must move thence into the State of Ohio only. The coal here in question was transferred from barge to car at Smith's Ferry, Pennsylvania, thence moved to Brush Run, Ohio, the point where the newly constructed railroad of the Pittsburgh Coal Company connected with the south end of the spur of the Lisbon and where the Coal Company had constructed a washing or cleaning plant. Upon arrival at Brush Run and without pause, the coal continued its movement through the cleaning plant and was loaded directly into cars furnished by the Lisbon. There is no consumption of coal either at Smith's Ferry or at Brush Run and no stock piles of coal, before or after cleaning, are maintained at Brush Run. The movement is continuous from Smith's Ferry, Pennsylvania, into cars at Brush Run for movement to ultimate destination in Ohio.

At Smith's Ferry, the coal was held in barges from August 25, 1934, until approximately the middle of the following month when it was unloaded into cars, moved to and through the cleaning plant at Brush Run and loaded into four cars furnished by the Lisbon. While the coal was in barges on the Ohio River, in Pennsylvania, en route to Smith's Ferry, instructions were given by the Pittsburgh Coal Company to its representative in Youngstown to find purchasers in Ohio (R. 144-149) and these particular car loads of coal "were sized in accordance with the orders taken for the coal by our sales manager at Youngstown, Ohio, from the customers to whom these cars were to go" (Morrow R. 146). These four cars were transported on

September 12, 1934, by the Lisbon to its connection with the Suburban at Signal. The Suburban in turn hauled the cars to Youngstown, Ohio, and on September 19, 1934, tendered them to The Pennsylvania Railroad Company, its direct connection at Youngstown, to be turned over to the Erie Railroad Company and delivered by that line to consignees located on its rails.

Having knowledge of the foregoing facts, and believing also that the transaction constituted an attempt to evade the lawful interstate charges for switching at Youngstown, The Pennsylvania Railroad Company, in the exercise of its common law right and in accordance with its lawfully published tariffs on file with the Interstate Commerce Commission, had issued a "Notice of Prepayment" under date of September 18, 1934, to the effect that bituminous coal mined outside the State of Ohio would not be accepted from the Suburban at Youngstown for delivery to consignees located on the Pennsylvania or connecting lines "until all charges from its connection with the Youngstown & Suburban Railway to point of ultimate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission." Both the Pennsylvania and the Erie were at all times and are now ready and willing to accept and transport the cars here involved and all future traffic under like circumstances upon prepayment of the lawfully applicable interstate rates and charges. Both the Suburban, and the Coal Company, the shipper, have refused and continue to refuse to prepay the interstate charges and as a consequence the four carload shipments remain on the Suburban-Pennsylvania interchange track at Youngstown.

There is no controversy between the parties as to facts so stated and as disclosed by the record. Reasonably there can be none as to the verity of the statements made and as they may be hereinafter extended, for in every particular

the statements are and on examination will be found to be supported by the record, the Report and Findings of the Interstate Commerce Commission, the Report and Findings of and the Record of Proceedings before the Public Utilities Commission of the State of Ohio, of the Memorandum Opinion on Motion for Preliminary Injunction and Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Ohio, Eastern District of Ohio, and by admissions of Record made in pleadings filed by defendants in the District Court below, where the cause was heard on the pleadings and the Record before the Public Utilities Commission of Ohio, and the argument of counsel (R. 69).

The controlling question for the consideration of this Court is whether in the circumstances disclosed by the entire record the traffic, viz., the four car loads of bituminous coal, all of which was extracted from mines located in Pennsylvania owned and operated by Pittsburgh Coal Company, barged down the Monongahela River in barges and in tow of tug boats owned by the Coal Company to a river landing and so-called harbor at Risher, Pennsylvania, also owned and controlled by the Coal Company, thence further barged to the Coal Company's dock and unloading facilities at Smith's Ferry, Pennsylvania, where the traffic was transferred from barge to Coal Company's own cars, thence moved over Coal Company's own rails to contact with the Company's coal washer or preparation plant at Brush Run, Ohio, thence through the washer and dropped in cars suitably placed by the Lisbon and under Lisbon's power moved to and through Negley by employes of the Lisbon, which as stated is completely owned by the Coal Company, to and through Signal, in Ohio, where it was delivered to and thence transported by the Y. & S. which in turn, with exception of qualifying shares of its Directors, all of whom

were officers and directors of the Coal Company, was also completely owned by the Coal Company, all for transfer to the Erie for delivery to named consignees in Youngstown, was and is subject to rates prescribed in interstate tariffs published and on file with the Interstate Commerce Commission, or subject only to the lower intrastate rates prescribed by tariffs on file with the Public Utilities Commission of Ohio.

In considering and deciding that question the fact that the coals were currently mined from the Coal Company's mine in Pennsylvania "along with the rest of the day's outturn," that is, along with "other orders placed at that mine for coal" (R. 147) and in the regular course of business by the Coal Company, which was engaged in the business of mining, transporting and selling coal; that the Coal Company needed "to sell the amount of business that it can from those mines, utilizing the river transportation as far as possible"; that "the logical market for that coal (so mined in Pennsylvania) is northeastern Ohio, because it is the kind of coal that is not mined in Ohio, it is gas and by-product coal; that there is no coal of that character in the State of Ohio; that the steel industries, the manufacturers' industries of northeastern Ohio are dependent on coal of that character"; that "it is to the advantage of the Pittsburgh Coal Company to increase its sales of that type of coal in that market, and that as a business proposition it is to the advantage of the Coal Company and the consumers in that territory to utilize the cheap water transportation as far as possible" (J. D. A. Morrow, President, Pittsburgh Coal Co.; R. 144) should be constantly in mind.

Further, that with respect to the coals specifically involved in this controversy, the President of the Coal Company, Mr. Morrow, testified that on or about the 25th day of August, after the coals had been mined and lay on board

of barge, he directed the Company's "Sales Department to start a movement of coal over this road (route) into northeastern Ohio," because "at that time they advised me (Morrow) that it was ready for operation" (R. 147) "and they started the movement of coal up there. This happened to be the first barge that went. The Sales Department instructed our Sales Manager at Youngstown to take orders for coal from this Brush Run plant, find out what kind of coal the users in Ohio wanted and sell it to them, which was done" (R. 148).

Orders for coal for Ohio destinations "are filled at this Brush Run plant," but "each order is reported to our (Coal Company's) Sales Department at Pittsburgh * * * all of our different branch offices in any part of the United States or Canada report their sales daily to our office in Pittsburgh so that we have touch with all the business of the Company."

The witness (Mr. Morrow) further testified that "in all probability the coal was on the (its) way before the orders (of purchase) were received for it. That is usually the case with a large part of the coal that is mined. A part of it you have contracts for and another part you sell from day to day and this particular coal was an illustration of the current day by day sales. So I would say, Mr. Examiner, that without knowing exactly about it, the probabilities are that Mr. Egan (Sales Manager) at Youngstown obtained orders for that coal between the time the barge reached Risher (Pennsylvania) landing and the (time the) cars were loaded at the Brush Run plant * * *. Within that period of time he was advised that a barge load of coal was on the way and there would be further movement of coal and he could sell it" (R. 148). This evidence was not in anywise or particular attempted to be controverted. It stands unimpeached.

That these coals constituted commerce between the States of Pennsylvania and Ohio would seem to be too clear for question. Whether the fact that a part only of the entire transportation between origin in Pennsylvania and destinations in Ohio was accomplished by common carrier facility, changed or could change commerce so conducted from commerce between States to commerce solely within a single State is the question upon which the final disposition to be made of this cause would seem to turn.

ARGUMENT.

Commerce is trade, it is traffic. It is the interchange of goods, of merchandise and articles between traders, and merchants,—between those who have and those who desire to acquire. Neither specification as to the object nor the reason for its desired acquisition is important. That one possesses and another is able and willing to acquire for value constitutes the very soul of exchange, of trade, of commerce. Whenever a commodity or object of value has begun to move as an article of trade between owner and prospective buyer commerce exists. The movement of articles of trade by owner to the market place in the search for an able and willing purchaser is commerce in the making. The intent of the owner as well as his desire to seek a market and consummate a trade constitutes the particular article an article of commerce. It may be readily conceded that the mere movement of an article from place of its production to place of consumation by its owner will not impress the article in its movement with commercial quality, but if the intent of the owner in its moving i. e. transportation is to make transfer for value the movement constitutes transportation and assumes commercial quality, for commerce includes the transoprtation as well as the purchase, sale and exchange of commodities. Commerce is a unit, every element of which is indicated by the term.

If the movement from owner to purchaser takes place solely within the confines of a single State, it constitutes transportation in intrastate commerce but whenever a commodity has begun to move as an article of trade from one State to another commerce between the States has commenced. The intervention of the State boundary line, although unmarked and invisible cannot be disregarded.

The fact that several different and entirely independent agencies may be engaged in the transporfation of a commodity in commerce between States, some of which agencies act entirely within one State and others in or through two or more States, does not detract from the interstate character of the transportation. Each agency to the extent of its participation in the interstate movement is subject, to the rules and regulation of the interstate regulatory power.

The purchase of the Lisbon in 1927 by the Pittsburgh Coal Company which owned and operated mines in Pennsylvania, was an initial step in a general plan on part of the Coal Company to effect the marketing in Ohio of its coals mined in Pennsylvania. The Coal Company's application through the Lisbon submitted to the Interstate Commerce Commission for authority to construct correlated branch lines between Smith's Ferry, in Pennsylvania, via Lisbon and Mill Rock, to Youngstown, proclaimed beyond denial that intent and that purpose, and it is the contention here of appellants that when by denial on part of said Commission that intent and purpose was thwarted on March 16th, of 1928, the potential as well as purposeful desire on part of the Coal Company to establish interstate transportation of its desirable commodity for sale in the Youngstown market none the less persisted.

Undeterred by the Interstate Commerce Commission's expressed view that "the practical control and operation of

a common carrier by its principal shipper was a "condition to be avoided" and its declaration that if upon further investigation it should be found reasonable "to grant a certificate for the construction of a new railroad line between Smith's Ferry and the Youngstown district, consideration will (would) be given to the imposition of a condition that the Lisbon shall not be under the control, direct or indirect, of the Pittsburgh Coal Company or any other industry or industries." * * * the Coal Company in January, 1929, acting indirectly through the Lisbon, which it owned in entirety, acquired the Youngstown & Suburban, reconstructed its Board of Directors and in due course by its own funds mingled with those of the Lisbon constructed the connecting link between Columbiana and Signal and thereafter with its own funds on its own privately acquired lands suitable for right of way purposes, laid down its own rails between its docks and terminal facilities at Smith's Ferry and Negley. It is over the through route from Smith's Ferry, Pennsylvania, via Brush Run, Negley, Signal and Columbiana in Ohio, that the traffic owned and shipped initially from the Coal Company's river mines in vicinity of Pittsburgh, moved to the point of interchange between the Y. & S. and The Pennsylvania, where as understood and indicated it still reposes. To off set supposable contempt predicated upon disregard of the Interstate Commerce Commission's pronouncements, the Coal Company arranged for the movement from mines of origin through Smith's Ferry and its Brush Run washer to Negley, without bills of lading, but still as both owner and shipper of the partly moved traffic and owner of the Lisbon and the Y. & S., it effected issuance of bills of lading to cover the balance of the movement between Negley and the Youngstown destinations.

As long ago said by this Court in *McCall* v. *California*, 136 U. S. 104, "commerce" as used in the United States

Constitution, Article 1, Section 8, clause 3, includes the fact of intercourse and of traffic and the subject-matter of intercourse and traffic. The fact of intercourse and traffic embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and comprehends the act of carrying them on at these places by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons.

This definition of commerce in its entirety may be thought to have been somewhat restricted by the further pronouncement of this Court in *Adair* v. *United States,* 208 U. S. 161, to effect that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph and every species of commercial intercourse but not that commerce completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states.

In *Swift & Co.* v. *United States,* 196 U. S. 375, it was ruled that commerce among the states is not a technical legal conception but a practical one to be drawn from the course of business, and again in *Public Utilities Commission* v. *Landon,* 239 U. S. 236, it is said that what falls within commerce must be determined upon consideration of established facts and known commercial methods; and again in *Texas & New Orleans Ry. Co.* v. *Sabine Tram Co.,* 227 U. S. 111, it is said that it is the nature and the course of the traffic, and not its accidents which determines its character as inter- or intra-state.

Substance and not form controls in determining whether a particular transaction is one of interstate commerce and so the mere method of delivery is a negligible circumstance

if in substantial fact the transaction under the facts of a given case is "interstate commerce." *Heyman* v. *Hayes,* 236 U. S. 178.

In *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U. S. 52, it was expressly determined that interstate commerce is not confined to transportation nor, as we venture to interject, to the means by which transportation is effected, but comprehends all commercial intercourse between different states and all component parts of such intercourse, including the buying and selling of commodities for shipment from one state to another. In such a definition it takes no great stretch of the imagination to include with the buying and selling of commodities for shipment, the mining of commodities in one state with the abiding intent and purpose of shipping the output to another state for sale, if and when such intent and purpose is evidenced by the actual starting of the commodity on its way.

See *Coe* v. *Erroll,* 116 U. S. 517, where this Court held: that commodities (there logs) were in interstate commerce when they had "actually started in the course of transportation to another state or (had been) delivered to a carrier for (such) transportation," on a continuous journey.

Neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is essential to interstate commerce:

Baltimore & Ohio Southwestern R. Co. v. *Settle,* 260 U. S. 166, 171,

> "In determining whether commerce is interstate or intrastate regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate the power of Congress attaches to it and the provisions of the Act to Regulate Commerce enacted for the purpose

of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply."

Pennsylvania R. R. Co. v. *Clark Coal Co.*, 238 U. S. 456, 465, 466.

In *Covington Railway* v. *Covington*, 235 U. S. 537, 545, it was said even more positively, if this be possible, that:

"This Court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion."

See also:

Louisiana Railroad Com'n v. *Texas & Pacific Ry.*, 229 U. S. 336, 340;

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498;

United States v. *Erie R. Co.*, 280 U. S. 98, 101, and the numerous applicable cases therein cited;

Ohio Railroad Com'n v. *Worthington*, 225 U. S. 101.

EFFECT, IF ANY, OF PART-WAY TRANSPORTATION IN SHIPPER'S OWN VEHICLES.

Before the Public Utilities Commission of Ohio as well as before the District Court below it was contended by the Pittsburgh Coal Company and pressed to successful conclusion that because the coal moved part way toward its plainly intended destination in barges and over rails owned by the shipper, neither commerce nor commercial transportation had begun until when after the coal had been put through the washer, and been tendered to the Lisbon at Negley, a standard form bill of lading covering the further

movement from Negley to Youngstown destinations had been issued.

Considered in the light of the many decided cases above cited and quoted from, such contention would seem to be unsubstantial and without solid foundation.

Even if the statements of the Coal Company as to the ownership of the barges and of the facilities including the rails up to Negley and as to their operation solely for owner purposes as opposed to common carriage be accepted as true it would seem to be unimportant and but mere incidents of the transportation movement when the essential character of the commerce dependent upon such movement is considered. That the owner and shipper, that is, the Pittsburgh Coal Company, actually started the coals on a predetermined and intentioned journey from owner's points of production in Pennsylvania to open markets in northeastern Ohio to be there sold or delivered to *en route* purchasers are the essentials that define both the transportation and the character of the commerce and determine both the obligations and the rights of any intervening carrier under applicable law.

Knowing as it did and was bound to know that the coal constituting the commerce had originated in Pennsylvania and was being transported by common carriers to Ohio destinations on intrastate billings which, if false, might subject intermediate or terminal carriers accepting same to heavy penalties at the instance of others, was The Pennsylvania to ignore the known fact of origin and complacently make itself party to seemingly obvious fraud?

Commerce between the States is a practical matter. It cannot be transformed into commerce solely intrastate by effecting a part of its necessary transportation whether that be small or large, by means and facilities not primarily subject to Federal control.

The record plainly shows that when the coal arrived by barge at Smith's Ferry, Pennsylvania it was not intended to move nor could it move elsewhere than into Ohio. There was no consumption at Smith's Ferry, Pennsylvania, and there was no practical means, other than dumping into the river as waste, of disposing of the coal at that point. Likewise, at Brush Run there was and is no consumption of coal nor is there any possibility of disposing of it for use commercially at that point. Coal brought by barge to Smith's Ferry cannot sanely be intended for ultimate consumption commercially at any point in Ohio which can be reached without the employment of common carrier facilities. From Smith's Ferry, Pennsylvania, all the coal intended for trade must be moved to destinations in the adjoining state of Ohio, and some part of its transportation through that state must be over a common carrier. Pittsburgh Coal Company's intention originally manifested and expressly declared when the application for leave to construct the branch lines was filed before the Interstate Commerce Commission, the known facts surrounding the movement of this coal from Smith's Ferry to Youngstown, the lack of ability to deliver it at any market point in Ohio without the aid of a common carrier, the publicly manifested intention on part of the Coal Company to market Pennsylvania Coal in Ohio with the facilities which it had therein assembled, all establish the continuing purpose of Pittsburgh Coal Company, and the essential elements necessary to impress this traffic indubitably with interstate status.

Southern Pacific Terminal Company v. *Interstate Commerce Commission and Young* (two cases), 219 U. S. 498, *et sequitur,* would seem to be very much in point and in principles enunciated to afford full refutation of appellees contention.

Young was a shipper of cottonseed products at the port of Galveston, Texas. He leased from The Southern Pacific

Terminal Company, a corporation organized to construct and maintain wharves and docks for the accommodation of all kinds of vessels and particularly to construct and maintain terminal facilities "for the use of what are commonly called the Southern Pacific Railway and Steamship Systems" docking space for preparing and forwarding his products beyond the port.

The Galveston, Harrisburg and San Antonio Railway in which the Southern Pacific Company, a holding company, owned stock, was the only railroad having physical connection with the tracks of the Terminal Company, which owned track facilities located on its own lands. The Terminal Company owned no cars or locomotives and issued no bills of lading. It owned no stock in any of the railroads or corporations in which the Southern Pacific owned stock. It carried on a wharfage business and published a schedule of charges for such business which it did not file with the Interstate Commerce Commission. The Terminal Company was a party to circulars issued by the Southern Pacific Company for advertising purposes. It charged a fixed wharfage for all freight passing over its piers to or from vessels berthed thereat and upon certain idle and otherwise useless lands owned by it. Pursuant to negotiation with Young, it constructed a pier for Young's use, and erected thereon a warehouse and platform, all at an expense of $65,000 and for the use of which Young agreed to pay the Terminal Company a yearly rental of $15,000. He took possession of said pier and improvements, paid the price stipulated and erected thereon, presumably at his own expense cottonseed cake sacking and grinding machines at an outlay of approximately $50,000.

A competitor in the business of buying, selling and converting cotton seed cake and meal, complained to the Interstate Commission against the Southern Pacific Company and the Terminal Company that the arrangement with

Young constituted a violation of Section 3 of the Act to Regulate Commerce, giving him an undue and unreasonable preference and advantage over his competitors. Young was not made a party to the proceedings before the Commission but he appeared and testified as a witness for the Terminal Company. The Commission, upon consideration, required the defendant companies "to ceaes and desist" from granting Young the alleged undue preference. On appeals this Court, speaking through Mr. Justice McKenna, said:

> "(p. 517) The situation challenges attention. Appellants find in it nothing but the natural and legal result of the sagacity which could see an opportunity for profit and the enterprise which could avail of it. It was the simple matter on the part of Young, it is contended, of bringing his business to the ship's side and cutting out intervening expenses. And it is said that the Terminal Company had an equally lawful inducement. It had an idle property, • • • over which it had absolute control and which it turned into use and profit by the arrangement with Young. And this, it is insisted, was a simple exercise of ownership.
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> "(p. 521) Another and an important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal

Company as well as the railroad companies. As said by the Interstate Commerce Commission, 'the Terminal Company was organized to furnish terminal (p. 522) facilities for the system at the port of Galveston,' • • • 'forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation.' • • • Surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, 'a corporation such as this Terminal Company, which has "competing lines," should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. • • • The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority.'

"The reasoning of the Commission is justified by the (p. 523) statute. It includes in the term 'railroad' 'all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, • • • and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of • • • property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of said property.' • • • The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is

with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and (p. 524) made single by it. * * *

"(p. 525) The last contention advanced is that 'the order of the (Interstate Commerce) Commission transcends its jurisdiction, in that it regulates commerce purely State and intrastate, and also purely foreign commerce, neither of which is subject to its authority.'

"In support of this contention it is insisted that the evidence shows * * * the cake and meal purchased by Young are bought by him * * * chiefly in Texas and shipped to him on bills of lading and way bills, showing (p. 526) the point of origin in those States and the destination at Galveston (Texas). *The purchases are made for export, there being no consumption of the products at Galveston.* His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. * * *

"This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is 'a final point of concentration and manufacture, the cotton seed cake being there manufactured into meal and sacked for export.' * * * *The manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the trans-shipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise* (p. 527) *would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy.* It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point

was Galveston or some other place in Texas. *They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination,* the Terminal Company being a part of the railway for such purpose. The case therefore, comes under *Coe* v. *Errol,* 116 U. S. 517, where it is said that *goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State,* or (been) delivered to a carrier for transportation.' * * *'' (Italics supplied.)

It is submitted that there is sufficient of resemblance in the matter and the methods adopted to achieve forbidden advantage and to thwart the purpose of the Congress as expressed in the Act to Regulate Commerce, between the cited and the instant case, to make the arguments advanced as bases for decision in the *Young* case well worthy of consideration and application in principle to the case at bar.

Compare also *Cin., N. O. & Tex. Pac. Ry.* v. *Interstate Commerce Commission,* 162 U. S. 184, at 191 *et seq.*

In the instant case Pittsburgh Coal Company, an owning producer and shipper of coal through wholly owned common carrier subsidiaries, has sought by the device outlined, which necessarily must invite question and close scrutiny, to attaint commerce, in every essential respect interstate with a local intrastate quality and character.

In *Railroad Commission of Ohio v. Worthington, Receiver of Wheeling & Lake Erie R. R. Co.,* 225 U. S. 101, an order of a State Commission establishing a given rate on so-called "Lake-cargo coal" from the Number Eight Coal Field in eastern Ohio to the ports of Huron and Cleveland, Ohio, was attacked and a permanent injunction granted on the ground that the rate fixed by the local Commission which in-

cluded in its application the placement of the coal under movement into vessels ready to be carried beyond the State destination was "as to merchandise intended for points beyond the State, a burden on interstate commerce and beyond the power of the State to impose, even if the merchandise is billed from a point within the State to the (another) point (within the State) where the vessel" may be, and it was further decided on citation of *Southern Pacific Terminal Co.* v. *Young,* 219 U. S. 498, *supra,* that "through billing to destination point beyond the State is not always a necessary incident to a shipment in interstate commerce."

In disposing of the Worthington case, this Court, speaking by Mr. Justice Day, noting in passing that the coal there in question was shipped from Ohio to Huron or Cleveland where the complainant had large dock facilities and expensive machinery and appliances for unloading coal into vessels, consigned to the owner or operator or some office employee, and

> "(p. 107) that when the coal leaves the mines it is not known in what vessel it will be loaded nor to what particular ultimate destination it will go, and that sometimes such coal is sold and vessels arranged for after the coal is at Huron, * * *; (that
>
> "All coal thus loaded in vessels is, and must practically be, carried to points in other States—or to Canada,"

in disposing of the matter said:

> "(p. 108) It is true that the shipper transports the coal ordinarily upon bills of lading to himself, * * * at Huron on Lake Erie (in Ohio). The so-called 'lake-cargo coal' is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put in vessels for carriage beyond the State, usually to upper lake ports, and then and only then the seventy-cent rate fixed by the Commission applies. * * *

> The situation then comes to this, that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels and thence carried to upper lake ports beyond the State. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be * * * (p. 109) from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

Citing *Southern Pacific Terminal Company* v. *I. C. Commission and Young,* 219 U. S. 498, the Court quoted somewhat at length from the opinion in that case concluding as follows:

> "(p. 110) It is contended that this transportation of the coal under the rate fixed by the (State) Railroad Commission is not within the power and authority of the Interstate Commerce Commission under paragraph 1 of the Act to Regulate Commerce, which makes the provisions of the act inapplicable to the transportation of property wholly within one State, and not shipped to or from a foreign country from or to a State or Territory; and, furthermore, that a transportation (p. 111) of the character here in question is only within the jurisdiction of the Interstate Commerce Commission when it is a transportation partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; and therefore that the subject-matter in question is left within the state jurisdiction. * * * It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce

> and is therefore beyond the power of the State or a commission assuming to act under its authority.
> * * *

Paraphrasing the conclusion so expressed it would seem from the unquestioned facts that the plan of the shipper to effect the through movement in commerce of its coal from mines in Pennsylvania destined for sale at Ohio consuming points, by an unified system of water and rail facilities wholly shipper owned or controlled and through such a system composed of both privately owned and common carrier facilities equipped for such tranpsortation, at other than Interstate Commerce rates cannot lawfully be accomplished.

If the movement of the traffic from origin to destination be in fact between States, and be both through and as continuous as the facilities afforded will permit or as the whim of the shipper and its appreciation of market conditions indicate to be desirable, such movement is one in interstate as opposed to intrastate commerce. That the initial movement from mines or the delivering movement at destination market or to consignees may be effected in part by facilities owned by the shipper is but incidental with respect to an entire movement which in part necessarily must rely upon common carrier facilities which through stock control or other ownership are dominated in action by said shipper.

While not so stated in the opinions cited it may readily be assumed from the known facts attending the trade that much of the coal movement beyond Huron and Cleveland to the upper lake destinations considered in the *Worthington* case *supra* was effected in non common carrier operated bottoms, and an examination of the transcript of the record in *United States* v. *Erie R. R. Co.*, 280 U. S. 98, on file in this Court shows that much of the inbound movement from

origins to Hoboken, N. J. for delivery at Garfield, N. J. beyond, was effected by carriers not subject to the Interstate Commerce Commission, but despite attempts to camouflage its true character by local billings from Hoboken to Garfield, both in New Jersey, and despite the fact that title to the shipment did not pass until arrangements had been fully made at Hoboken dock for the shipment of the particular lot to Garfield, it was held that that movement was but part and parcel of foreign commerce, and the essential nature of the shipment was unaffected by circumstances of changing title or local billings or of incidental detentions of convenience at intervening points, the continuing intent from beginning to end contemplating Garfield as final destination.

In the instant case the proof is ample and undisputed that the Pittsburgh Coal Company ardently desired consumption of output of its mines in Pennsylvania by the great industries clustered about Youngstown in Ohio, and that its continuing intent throughout the movement of the shipments of coal here involved was to effect and to accomplish that end with the least expense to itself and regardless of the bearing of Federal laws and Federal regulatory authority.

In *Baer Brothers* v. *Denver & R. G. R. Co.*, 233 U. S. 479, 490, the Court considered a transportation movement from Pueblo, Colorado, to Leadville, Colorado, which was part of a prior continuous movement from St. Louis, Missouri. It was held that the transportation performed between Colorado points was part of the interstate through movement, the court saying:

> "But while there was no through-rate and no through-route there was in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating

> the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation."

Nor does the fact in instant case that the coal is washed and sized at Brush Run break the continuity of the interstate movement. In *State* v. *Engle,* 34 N. J. L. 425, cited with approval in *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366, coal mined in Pennsylvania was shipped by cars to Elizabethport, N. J., to be thence shipped by water to other markets for the purpose of sale. At Elizabethport on tidewater the coal was deposited and separated according to its different sizes, and when a cargo of one size was obtained it was shipped to points in other States as soon as a vessel could be chartered to carry it, no coal being sold for consumption at Elizabethport. The Court said:

> "The power of the state to tax the subjects of commerce, where their transit for the purposes of commerce has ceased, and they have become incorporated and mixed up with the mass of property in the community, is well settled. But that a tax on property belonging to a citizen of another state, in its transit to market in other states, which is delayed within this state, not for the purpose of sale, but merely for separation and assortment for the convenience of shipping to its destination, is a tax on commerce among the states, is too plain to require argument.
>
> "Delay within the state, which is no longer than is necessary for the convenience of trans-shipment for its transportation to its destination, will not make it property within the state for the purpose of taxation."

How much stronger is the instant case where the interruption at Brush Run was not for the purpose of procuring a purchaser but solely for the purpose of transferring from cars for washing and sizing.

To like effect is the ruling of this Court in *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, where it is said at page 126—

> "The determining circumstances is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

An interesting case, adding both point and authority to this line of argument is *Kirkmeyer* v. *Kansas*, 236 U. S. 568, where a purveyor of liquors "in open and persistent violation of law and thereby committing a nuisance", identified with Leavenworth, Kansas, for reasons transferred his business to Stillings, in Missouri, just across the river from the former.

Business continued as theretofore with exception that on telephone orders deliveries were made from Stillings, Missouri, in Leavenworth, Kansas, across the State line, by means of his own horse-drawn wagons.

Holding that traffic in a recognized article of trade so conducted constituted interstate commerce, the regulation of which had been committed to the Congress, this Court said, page 572, that:

> "The right to send it (beer) from one State to another and the act of doing so are interstate commerce

> the regulation whereof has been committed to Congress; a State law which denies such right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States. * * * (Citing cases.)
>
> "The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error (Kirkmeyer) within the State of Kansas was interstate commerce. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater distance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate—that must be tested by the actual transactions."

Another matter for consideration is the effect or importance of the control by the Pittsburgh Coal Company through stock ownership of the Lisbon and the Suburban, and ownership of the line from Smith's Ferry, Pennsylvania, to Negley, Ohio. This unified control and operation are important facts to appellants, who successfully opposed the application of the Lisbon to construct the proposed line from Smith's Ferry to Youngstown. These facts take on added importance if by the mere failure to incorporate the line from Smith's Ferry, Pennsylvania, to Negley, Ohio, as a railroad or the unwillingness of the Coal Company to consider it as it was originally proposed to be, an extension of the Lisbon, the purpose originally denied to the proprietary interest is nevertheless to be accomplished and the order of the Interstate Commerce Commission held for naught. Certainly the Interstate Commerce Act is in vain if commerce originally contemplated as interstate may become intrastate by any such subterfuge, and thus be removed in all of its aspects from the jurisdiction of the body created to regulate it.

THE LISBON RAILROAD IDENTIFIED THE TRAFFIC AS INTERSTATE COMMERCE IN REFUSING TO SUBJECT IT TO DEMURRAGE CHARGES AT THE BRUSH RUN WASHER AT NEGLEY, OHIO.

More than 48 hours elapsed from the time the four cars were placed empty on the track of the Pittsburgh Coal Company at Brush Run until they were offered under load to the Lisbon. The "free time" for loading is 48 hours and beyond that free time railroad demurrage charges are applicable under a tariff filed with both the Interstate Commerce Commission and the Public Utilities Commission except that no demurrage charges apply on cars held at * * * "washers * * * located at or adjacent to the mines producing the coal to be washed * * * and such cars under load with such commodities at such * * * coal washers * * *." The President of the Lisbon testified before the Ohio Commission that under the exception quoted, demurrage charges were not regarded as applicable and therefore were not assessed. In so applying the exception, the Lisbon necessarily did these two things:

(a) Regarded the washer at Brush Run, Ohio, as adjacent to the mines in Pennsylvania which produced the coal;

((b) Definitely connnected the washed coal in cars at Brush Run, Ohio, with the mine of its origin in Pennsylvania.

In allowing the exemption from demurrage it is plain that the Lisbon vested the traffic with an interstate character. That this is so necessarily follows from the fact that the exemption granted is conditioned upon the establishment of a continuous relation between the washed coal in cars at the washer at Brush Run, Ohio, with the mine of its origin in Pennsylvania. Having thus regarded the coal as interstate commerce for purposes of the demurrage schedule, it is clear that the same coal in the same cars

from the same washer to final destination could not be regarded by the Lisbon as intrastate commerce in applying transportation charges. To hold otherwise is to argue the untenable proposition that at one and the same time given shipments may be regarded as intrastate commerce for purposes of one railroad schedule and interstate commerce for purposes of another.

THE DISTRICT COURT MISCONCEIVED AND MISAPPLIED DECISIONS OF THIS COURT IN OTHER CASES TO THE FACTS IN THE INSTANT CASE.

In holding that the transportation involved, although interstate, was not commerce subject to the jurisdiction of the Interstate Commerce Commission and that therefore the State authorities were free to exercise control over that part of the carriage in Ohio performed by common carriers, the District Court cited decisions of this Court in the cases of *Santa Fe, Prescott & Phoenix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177; *The Pipe Line Cases*, 234 U. S. 548; *Atlantic Coast Line R. R.* v. *Standard Oil Co.*, 275 U. S. 257, in support of its conclusions.

The reasoning and manner of application of those decisions by the lower court is not made clear in its brief memorandum opinion, but an examination of those cases, we think, will show that the District Court misunderstood the legal effect of the decisions therein and incorrectly applied them to the dissimilar factual situation presented in the case at bar.

The first cited case (*Santa Fe, etc., Ry. Co.* v. *Grant Brothers*, 228 U. S. 177) involved only the question of the right of a railroad company to exempt itself from liability for its own negligence when acting, not in the capacity of a common carrier, but merely as a contracting party to an agreement for the construction and improvement of its

road. There was no question of interstate commerce involved in that case, the contractor's services as well as the carriage of its men and supplies having been performed wholly within the State of Arizona. This Court said at page 188 of its opinion in that case:

> "It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions."

It plainly appears therefore that there is not the remotest analogy between the *Grant Brothers* case and the case at bar. The fact that a railroad company transporting materials for the construction of its own road was held to be "not acting in the performance of its duty as a common carrier" and the movement not subject to published tariffs, clearly affords no basis for the conclusion in the case at bar that continuous transportation from one State to another performed by an unified system of transportation under single operating control was similarly "outside the policy" of the provisions of the Interstate Commerce Act.

In *The Pipe Line Cases*, 234 U. S. 548, the following language appears at pages 561-562 of the court's opinion:

> "There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the

> sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

The factual situation here is entirely different. The coal does not move from Pennsylvania as "merely an incident to use" by the Pittsburgh Coal Company at Brush Run, Ohio. The continuous interstate movement from Pennsylvania is performed for the sole and continuing purpose of placing the coal in the hands of the ultimate consumer at Youngstown, Ohio. The commodity moves into Brush Run, Ohio, as coal, and, after an interruption of insignificant duration, moves out of that point as coal subject to transportation rates applicable on coal. In the cited case, the owner but moved the crude oil from point of production, not for barter nor in the course of trade, to its refineries for manufacture where its identity and commercial characteristics were completely changed and converted into various products which when they left the refinery in the course of trade moved under different transportation rates from oil.

In the *Standard Oil Company* case (275 U. S. 257), the plaintiff maintained at Port Tampa, Tampa and Jacksonville extensive facilities for receiving and storing gasoline, refined oil, lubricating oil and fuel oil, all of which were obtained from Louisiana or Mexico and brought by steamer into Port Tampa and Jacksonville. The commodities in question were pumped from the ships through plaintiff's pipe lines, either directly into plaintiff's storage tanks or into tank cars, in which the oil was moved by rail to its

other storage tanks a few miles distant, and deposited therein. Title passed to the plaintiff on delivery, and settlements with its vendors were made on the basis of the amounts so actually delivered by them, at market prices or at prices fixed in advance in yearly contracts calling for delivery of specified quantities each month. In the arrangements with the vendors, none of the oil brought in was designated or intended for any destination in Florida beyond the storage tanks or tank cars into which it was delivered from the ships, and there was neither necessity nor purpose to send any of it through the storage stations to interior points by intermediate continuity of movement, although delivery into storage tanks might occur contemporaneously with withdrawal of oil from the same tanks for the purpose of supplying plaintiff's bulk and service stations, and although sales of fuel oil to customers were largely contracted for by plaintiff in advance of shipment of such oil to plaintiff from point of origin.

The question was whether rail transportation of the oil from the storage tanks to plaintiff's customers in Florida, or to plaintiff's bulk and service stations therein from which it was sold to such customers, was State or interstate commerce. In its opinion, this Court pointed out (p. 264) that the plaintiff paid local taxes to the State of Florida on all of its products on hand in storage tanks, that plaintiff (p. 266) had been conducting its business in the manner stated for many years, and it was not adopted for the purpose of evading the payment of interstate rates, and its business could not be conducted without the storage facilities described. In holding that the transportation involved was intrastate and subject to intrastate rates, this Court said (pp. 267-270):

> "It seems very clear to us on a broad view of the facts that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the

storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations and drive-in stations, or directly by tank wagons to customers, is all intrastate commerce. This distribution is the whole business of the plaintiff in Florida. There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff. There is no designation of any particular oil for any particular place within Florida beyond the storage receptacles or storage tank cars into which the oil is first delivered by the ships. The title to the oil in bulk passes to the plaintiff as it is thus delivered. When the oil reaches these storage places along the Florida seaboard, it is within the control and ownership of the plaintiff for use for its particular purposes in Florida. The plaintiff is free to distribute the oil according to the demands of its business, and it arranges its storage capacity to meet the future variation in its business needs at Tampa, Port Tampa, or Jacksonville or St. Johns River Terminal.

The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars. *Chicago, M. & St. P. Ry. Co.* v. *Iowa,* 233 U. S. 334. The change from rail to ship has often been held consistent with a continuity of interstate or foreign commerce, even though there may be only local billing. *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111; *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.,* 229 U. S. 336; *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande Railroad Co.,* 233 U. S. 479. On the other

hand, in *Chicago, M. & St. P. Ry. Co.* v. *Iowa, supra,* the reshipment of an interstate shipment of coal after its arrival in the state in the same carload lots was held not inconsistent with the change from interstate to intrastate commerce. In *Baltimore & Ohio S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, 170, a shipper billed his goods from one state to another, paying the interstate freight and reshipped them to another point in the second state, intending from the first to reach the latter destination, but interrupting the transportation only to take advantage of a difference in his favor between the through rate and the sum of those paid. It was held that the essential nature of the entire movement was in interstate commerce and that the shipper must pay the only lawful rate, which was the interstate commerce rate to the final destination. These cases are illustrations to show that the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it.

The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate, and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plain-

tiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations, is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it. Neither the sellers who deliver the oil, nor the railroad company that aids the delivery of the oil to the storage tanks and tank cars at the seaboard, has anything to do with determining what the ultimate destination of the oil is, or has any interest in it, or has any duty to discharge in respect to it, except that the railroad company, after the storage in Florida has been established for the purposes of the plaintiff company, accepts the duty of transporting it in Florida to the places designated by the plaintiff company.

The compensation for the transportation of the oil through the pipe lines from the steamers to the storage tanks or to the storage tank cars, and the transportation of those cars to the seaboard storage tanks of the plaintiff, is not here in question, and we are not asked to determine whether such deliveries to the storage tanks and cars on the seaboard from the steamers are interstate or foreign commerce.

We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate."

From the foregoing description of the case and the language quoted, it is obvious that there is no parallel between the facts in that case and those in the case at bar. There is no storage of coal at the Brush Run cleaning plant nor distribution from that point. The intended destination of the coal here in question was known even before it arrived at the barge unloading facilities at Smith's ferry, Pennsylvania, all of the facilities employed in the transportation of this coal up to Youngstown, are owned and controlled by the Coal Company. There is, moreover, the absolute necessity that the coal be sent through the Brush

Run plant to points in Ohio "by immediate continuity of transportation." The case is unlike that cited, in the further respect that the Pittsburgh Coal Company has only recently began conducting its business in the manner stated, and we thing the conclusion is unescapable that in this instance "it was adopted for the purpose of evading the payment of interstate rates." The facts in this case are more nearly analogous to those considered in *Railroad Commission of Ohio* v. *Worthington,* 225 U. S. 101, and *Erie Railroad Co.* v. *United States,* 280 U. S. 98.

In Conclusion.

Upon the strength of the evidence adduced on the trial before the District Court, all of which emenated from witnesses sworn on behalf of the appellees here and none of which has been sought to be controverted, it is respectfully submitted that the coal with which we are here concerned was mined in Pennsylvania from mines owned and operated by the Pittsburgh Coal Company, for the purpose of transportation and sale to consuming industries located at and in the vicinity of Youngstown in the State of Ohio; that it was moved from mines in Pennsylvania to Y and S—Pennsylvania interchange in Ohio by water and rail facilities dominated from origins to said point of interchange by the Pittsburgh Coal Company, which was also the producing owner and the shipper of the freight; that from the beginning of the transportation movement the coals were destined for delivery and consumption in the Youngstown market; that even if not sold before transportation started they were at all times open to sale and purchase and sale actually was effected at some point between Risher in Pennsylvania and Bush Run in Ohio; that the essential character of the transportation movement from beginning to intended destination was interstate, and that character was not altered or in any manner restricted by its separa-

tion into component segments and the application of local intrastate billings thereto; that the very evident purpose on part of the Pittsburg Coal Company as both owner and shipper of the freight to circumvent both applicable provisions of the Interstate Commerce Act and the specific denial of a certificate of convenience and necessity by the Interstate Commerce Commission invites condemnation on part of this Court and justly compels reversal of the decree of the District Court and remand of the cause with an instruction to enjoin and restrain enforcement of the order of March 26, 1935, of Public Utilities Commission of Ohio, as prayed by appellant's bill.

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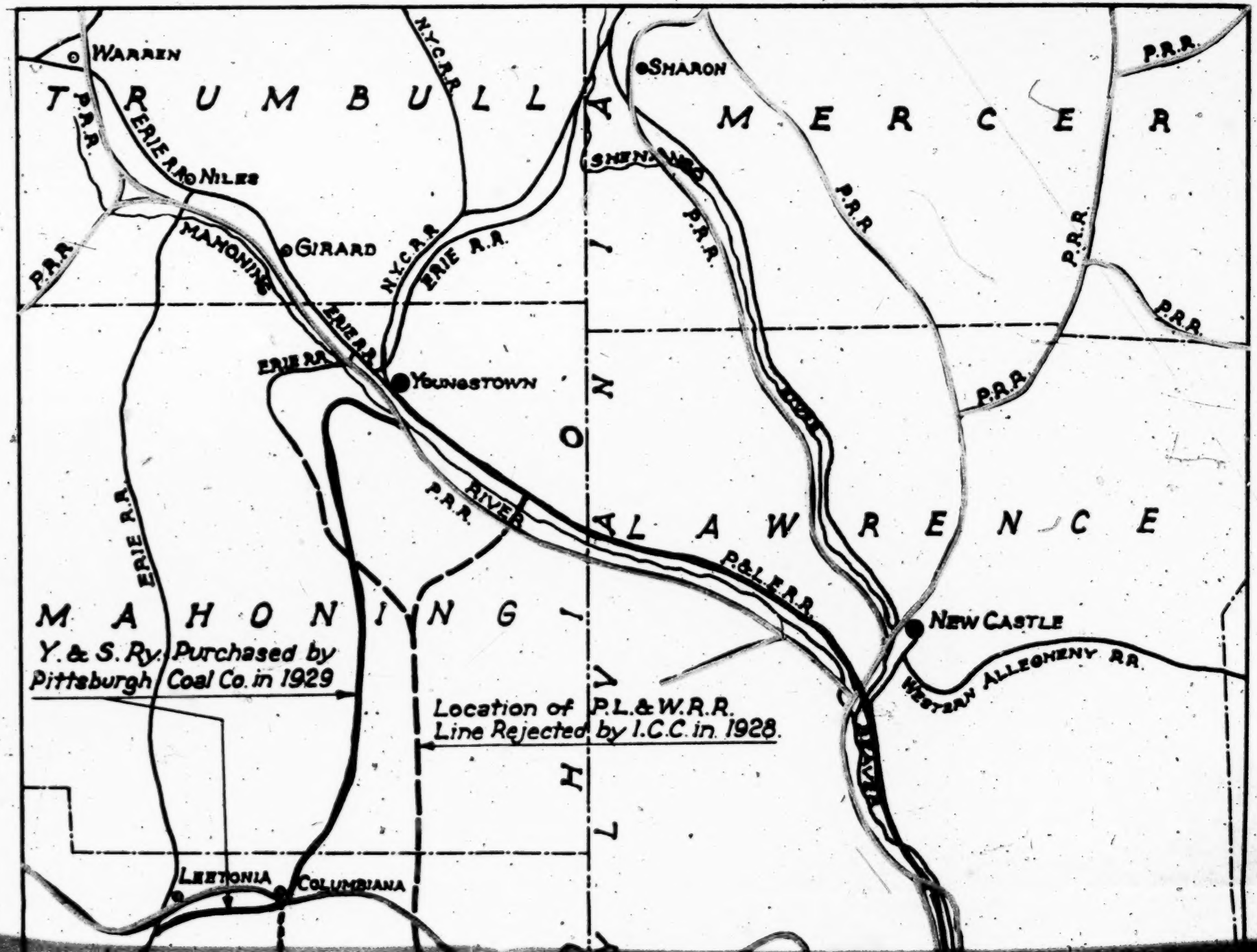
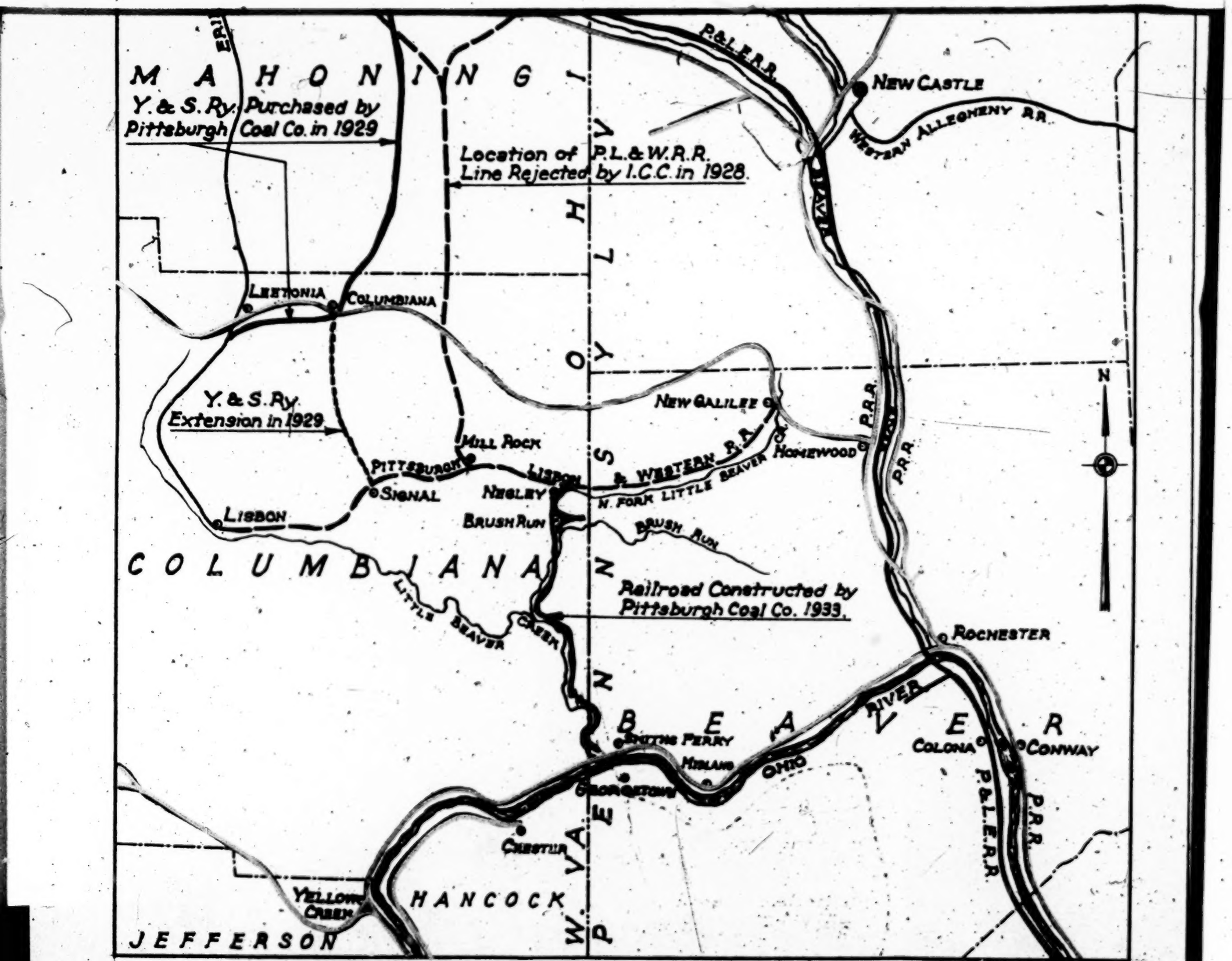

TRUMBULL
MERCER
MAHONING
LAWRENCE
WARREN
NILES
GIRARD
YOUNGSTOWN
SHARON
NEW CASTLE
LEETONIA
COLUMBIANA
P.R.R.
N.Y.C.R.R.
ERIE R.R.
MAHONING RIVER
BEAVER RIVER
P.&L.E.R.R.
WESTERN ALLEGHENY R.R.
Y. & S. Ry. Purchased by Pittsburgh Coal Co. in 1929
Location of P.L.&W.R.R. Line Rejected by I.C.C. in 1928.


MAHONING
Y. & S. Ry. Purchased by Pittsburgh Coal Co. in 1929
Location of P.L. & W.R.R. Line Rejected by I.C.C. in 1928.
P. & L.E.R.R.
NEW CASTLE
WESTERN ALLEGHENY R.R.
ERIE
LEETONIA
COLUMBIANA
Y. & S. Ry. Extension in 1929
NEW GALILEE
P.R.R.
MILL ROCK
PITTSBURGH & WESTERN R.R.
HOMEWOOD
PITTSBURGH
LISBON
SIGNAL
NEGLEY
N. FORK LITTLE BEAVER
LISBON
BRUSH RUN
BRUSH RUN
COLUMBIANA
Railroad Constructed by Pittsburgh Coal Co. 1933.
LITTLE BEAVER CREEK
ROCHESTER
BEAVER RIVER
SMITHS FERRY
MIDLAND
OHIO
GEORGETOWN
COLONA
CONWAY
P.R.R.
P. & L.E.R.R.
CHESTER
YELLOW CREEK
HANCOCK
JEFFERSON
W. VA.